

The Texas Commission on Environmental Quality (TCEQ, agency, or commission)
adopts the amendment to §35.29.

The amendment is adopted *without change* to the proposed text as published in the
December 25, 2015, issue of the *Texas Register* (40 TexReg 9484) and will not be
republished.

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking is adopted to implement Senate Bill (SB) 1267 adopted by the 84th
Texas Legislature (2015), with an effective date of September 1, 2015. SB 1267 amends
the Texas Administrative Procedure Act (APA), codified in Texas Government Code,
Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates
numerous requirements related to notice of contested case hearings (CCHs) and agency
decisions, signature and timeliness of agency decisions, presumption of the date that
notice of an agency decision is received, motions for rehearing regarding agency
decisions, and the procedures for judicial review of agency decisions. Rulemaking
implementing SB 1267, Sections 4, 6, 7, and 9 was adopted by the commission on
December 9, 2015, in 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules,
General Provisions; Chapter 50, Action on Applications and Other Authorizations;
Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public
Comment; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings (Rule

Project No. 2015-018-080-LS).

In corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts the amendment to §55.255 and the repeal of §80.271, which will complete the rulemaking necessary to implement SB 1267.

Section Discussion

The commission adopts an updated a cross-reference in §35.29 from §80.271, which is concurrently adopted for repeal, to §80.272. Section 80.272, was amended by the commission on December 9, 2015, and applies to motions for rehearing for CCHs regarding permit applications.

In addition to the adopted amendment, various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is

not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendment to §35.29 is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Rather, it is procedural in nature and implements changes made to the APA in SB 1267 by revising a cross-reference in a commission rule regarding a CCH for emergency and temporary order applications.

The rulemaking is procedural in nature and does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of

the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the adopted amendment to §35.29 is procedural in nature and implements changes made to the APA in SB 1267 regarding commission action on requests for CCH. This adopted rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the law described in the Statutory Authority section of this rulemaking.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendment revises a rule regarding commission action on requests for CCH and is procedural in nature. The primary purpose of the adopted rulemaking is to update a cross-reference to a rule that implemented changes made to the APA in SB 1267. Promulgation and

enforcement of the adopted rulemaking will not burden private real property. The adopted rule does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5).

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendment affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Public Comment

The commission held a public hearing on January 26, 2016. The comment period closed on January 29, 2016. The commission received no comments on the proposed rulemaking.

SUBCHAPTER C: GENERAL PROVISIONS
§35.29

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, Chapter 5, Subchapter L, concerning Emergency and Temporary Orders, which authorizes the commission to issue and hold hearings regarding emergency and temporary orders. Additional relevant sections are Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute or Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; Texas Government Code, §2001.142, concerning Notification of Decisions and Orders, which prescribes requirements for the notification of decisions and orders of a state agency; Texas Government Code, §2001.143, concerning Time of Decision, which concerns when

a decision in a contested case becomes final; Texas Government Code, §2001.144, concerning Decisions or Orders; When Final, which provides the time at which decisions in contested cases are final; and Texas Government Code, §2001.146, concerning Motions for Rehearing: Procedures, which authorizes the procedures for motions for rehearing filed with state agencies.

The adopted amendment implements TWC, §5.504; Texas Government Code, §2001.004; and Senate Bill 1267 (84th Texas Legislature, 2015).

§35.29. Procedures for a Hearing.

(a) Hearings before the commission under this chapter shall be conducted in accordance with Chapter 10 of this title (relating to Commission Meetings). Contested case hearings shall be conducted under the Texas Administrative Procedure Act (APA) and Chapter 80 of this title (relating to Contested Case Hearings).

(b) If a contested case hearing is requested on the application, and the commission grants the request, the commission shall either conduct the contested case hearing or remand the matter to the State Office of Administrative Hearings (SOAH).

(c) The commission or judge may, consistent with the requirements of the APA, reduce the time periods specified in the commission's rules governing contested case hearings.

(d) For any hearing on a temporary or emergency order, the following procedures will apply:

(1) parties will be designated by the commission or judge. To be designated as a party, the person seeking party status must show a justiciable interest. For each hearing under this section, the applicant, the public interest counsel, and the executive director are parties by rule;

(2) the testimony of all witnesses will be under oath, with an opportunity for questioning by the commission or judge and cross-examination by the other parties;

(3) other parties to the hearing will be given an opportunity to present rebuttal evidence and testimony;

(4) the applicant will have the burden of proving its need for an emergency or temporary order, and will have the right to open and close the evidentiary parts of the

hearing. The fact that an emergency order was issued without a hearing, standing alone, will not constitute evidence of the need for such authorization; and

(5) the commission or judge will have the right to limit the number of witnesses; to limit the time for direct questioning or cross-examination of a witness; to refuse illustrative and documentary evidence; and to limit argument.

(e) If a hearing request is denied, the procedures contained in §80.272 and §80.273 of this title (relating to Motion for Rehearing; and Decision Final and Appealable) apply.